Editor's note: Reconsideration granted; decision reversed by Director -- See 83 IBLA 237 (Oct. 22, 1984)

STATE OF ALASKA
v.
MARCIA K. THORSON

STATE OF ALASKA
v.
PHYLLIS WESTCOAST

IBLA 83-191 Decided October 18, 1983

Interlocutory appeal of an order of Administrative Law Judge E. Kendall Clarke denying a motion of the Bureau of Land Management to dismiss for lack of jurisdiction private contests brought by the State of Alaska against two Native allotment applicants. AL 81-5-P, Alaska Native Allotment AA-7208 and AL 81-6-P, Alaska Native Allotment AA-7307.

Affirmed.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Generally -- Alaska Native Claims Settlement Act: Native Land Selections: State-Selected Lands

The Department of the Interior retains jurisdiction to hear a contest brought by the State of Alaska against an applicant for a Native allotment where the lands sought by the Native were tentatively approved to the State following the commencement of the Native's use and occupancy. Section 906(c) of the Alaska National Interest Lands Conservation Act, providing for confirmation of all tentative approvals of State land selections subject to valid existing rights, does not convey the lands in dispute out of Federal ownership so as to remove the contest from the Department's jurisdiction.

APPEARANCES: Craig J. Tillery, Esq., Trey Eyerly, Esq., David Fleurant, Esq., Geoffrey T. Comfort, Esq., and Joel Bolger, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for contestees; Claire Steffens, Esq., M. Francis Neville, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for BLM; James Q. Mery, Esq., Fairbanks, Alaska for Doyon, Limited.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

By order dated October 21, 1982, Administrative Law Judge E. Kendall Clarke granted a petition by the Bureau of Land Management (BLM) to intervene in private contests brought by the State of Alaska against Native allotment applications AA 7208 (AL 81-5-P) and AA-7307 (AL 81-6-P), and denied BLM's motion to dismiss the contests for lack of jurisdiction. The State of Alaska joined BLM in its motion to dismiss. Judge Clarke held that the Department retained jurisdiction to hear these contests because the allotment applications were valid existing rights under section 906(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1635(c) (Supp. V 1981), and were, therefore, excepted from section 906's grant of land to the State until such time as under due process the applications may be set aside. In a memorandum to this Board, Judge Clarke certified his ruling for an interlocutory appeal pursuant to 43 CFR 4.28, stating that the ruling involves a controlling question of law and that an immediate appeal may materially advance the final decision. We agree and grant permission for the interlocutory appeal. 1/

There is no dispute about the facts. On November 15, 1970, Phyllis Westcoast applied for a Native allotment (AA 7307) in two parcels of land 2/ under the Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending applications, 43 U.S.C. § 1617 (1976)). She

1/ During the pendency of this appeal, Doyon, Limited (Doyon), one of 12 corporations established in 1972 pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 (1976), alleged that it had a direct and substantial interest in the outcome of this appeal. It requested that it be allowed to appear in this appeal as amicus curiae and brief the issues affecting it. The State opposed Doyon's request; BLM had no objection and responded substantively to Doyon's brief.

Section 906(c) of ANILCA, the focus of this appeal, specifically refers to Native selection rights, such as those possessed by Doyon. Doyon's participation in this appeal, we believe, brings to the briefing a point of view which the other parties could not be expected to represent. Counsel for Doyon is fully qualified to present the corporation's point of view. Consistent with the standards set forth in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), we believe it proper to allow Doyon to brief the issues as amicus curiae.

During the briefing period, the State requested that the Board hold oral argument because of the complexity and importance of the issues herein. Briefs were received from BLM, the State, contestees, and Doyon, Limited. Reply briefs were filed by the State and BLM. We believe that these pleadings comprehensively discuss the issues involved and we therefore find no need for oral argument. The State's request is, accordingly, denied.

2/ Parcel A consists of 80 acres in SE 1/4 SE 1/4 sec. 36, T. 10 S., R. 56 W., and NE 1/4 NE 1/4 sec. 1, T. 11 S., R. 56 W., Seward meridian. Parcel B consists of 80 acres in S 1/2 S 1/2 NE 1/4 and N 1/2 N 1/2 SE 1/4 sec. 28, T. 7 S., R. 55 W., Seward meridian.

alleged use and occupancy of the lands since August 1960. On May 2, 1961, the State filed a general purpose grant selection covering the land claimed by Westcoast. Because Westcoast's application was not of record until 1972, the United States on September 3, 1963, tentatively approved a State selection of land covering Westcoast's parcel B. On May 18, 1976, BLM approved Westcoast's application in its entirety and rescinded its tentative approval of lands covering parcel B. On March 20, 1980, pursuant to options set forth in State of Alaska, 41 IBLA 315 (1979), the State filed the above-captioned private contest against Westcoast for parcel B. No contest has been brought against lands forming parcel A of Westcoast's application.

In 1971 Marcia K. Thorson applied for a Native allotment (AA 7208) in one parcel of 160 acres, 3/ alleging use and occupancy since May 1960. On May 19, 1961, the State filed a general purpose grant selection covering the land claimed by Thorson. Again, because the Native allotment application was not of record until 1972, the State selection was tentatively approved on September 3, 1963. On May 5, 1976, BLM approved Thorson's application and rescinded the State's tentative approval as to that land. The State's contest against Thorson was filed on March 20, 1980.

Where, as here, the Native allotment applications describe land that on or before December 18, 1971, was tentatively approved to the State pursuant to the Alaska Statehood Act (72 Stat. 339) and was not withdrawn pursuant to section 11(a)(1)(A) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1610(a)(1)(A) (1976), from those lands made available for selection by section 11(a)(2) of the Act, the legislative approval provisions of section 905(a)(1) of ANILCA do not apply. William M. Tennyson, Jr., 66 IBLA 38 (1982). Section 905(a)(4) provides that such applications shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, ANCSA, and other applicable law. No forum is specified.

Section 906(c)(1) of ANILCA provides:

> (c) Prior tentative approvals
>
> (1) All tentative approvals of State of Alaska land selections pursuant to the Alaska Statehood Act are hereby confirmed, subject only to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act, and the United States hereby confirms that all right, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval; except that this subsection shall not apply to tentative approvals which, prior to the date of enactment of this Act [December 2, 1980], have been relinquished by the State, or have been finally revoked by the United States under authority other than authority under section 11(a)(2), 12(a), or 12(b) of the Alaska Native Claims Settlement Act. [Emphasis supplied.]

3/ Thorson seeks SE 1/4 NW 1/4, NE 1/4 SW 1/4, E 1/2 SW 1/4 NW 1/4, E 1/2 W 1/2 SW 1/4 NW 1/4, E 1/2 NW 1/4 SW 1/4, E 1/2 W 1/2 NW 1/4 SW 1/4, and that portion lying west of Peace River in SW 1/4 NE 1/4 and NW 1/4 SE 1/4 sec. 29, T. 5 S., R. 56 W., Seward meridian.

In concluding that the Department retained jurisdiction to adjudicate Native allotment applications conflicting with tentative approvals, Judge Clarke held that a Native allotment application approved by BLM was a valid existing right and was, therefore, excepted from the grant of land set forth in section 906. No issue is raised on appeal questioning Judge Clarke's holding that an approved Native allotment application is a valid existing right. See Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), rev'g 15 IBLA 30 (1974).

The State and BLM maintain, however, that section 906's confirmation of tentatively approved lands conveyed full legal title in those lands to the State of Alaska. Lands selected by the State pursuant to the Alaska Statehood Act are said to be tentatively approved by BLM upon BLM's finding that such lands meet relevant criteria for compactness, are unreserved, are not known to be occupied or appropriated under the public land laws, including the mining laws, are not valuable for hot or medicinal springs, and otherwise conform to the requirements of the Statehood Act. The State and BLM contend that the Department lost jurisdiction over such lands upon the alleged conveyance of legal title from the United States, citing Germania Iron Co. v. United States, 165 U.S. 379, 386 (1897).

Contrary to Judge Clarke's view, the State and BLM contend that if Congress had meant to exclude or except lands to which third party rights had attached from section 906's legislative conveyance, it could have easily said so in the exception clause of section 906(c). They maintain, instead, that there are no exclusions in the instant conveyances effected by section 906(c) and that the State must yield portions of its title, as appropriate, where a valid existing right is proven. Such a right, they assert, must be proven in Federal court pursuant to procedures adopted by the Department to implement the Aguilar decision.

Our attention is directed to section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1976), wherein Congress required that all conveyances thereunder shall be subject to valid existing rights. The State and BLM point out that the Department has never construed the underscored language in interim conveyances or patents under ANCSA to allow BLM to correct unilaterally conveyances of land which mistakenly included lands claimed as a Native allotment. 4/ In such cases, the Solicitor's Office has requested a reconveyance from the Native corporation. The phrase "subject to valid existing rights" should be interpreted in the instant case to have the same meaning under ANCSA and ANILCA, the State and BLM argue. 5/

4/ Regulation 43 CFR 2650.3-1(a) provides that all conveyances under ANCSA shall exclude any lawful entry or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases, contracts, permits, rights-of-way, or easements.

5/ The State also calls our attention to section 906(1) of ANILCA wherein Congress provided that all conveyances to the State under section 6 of the Alaska Statehood Act, this Act, or any other law, shall be subject to valid existing rights, to Native selection rights under ANCSA, and to certain rights-of-way or easements.

Contestees take a contrary position. They maintain that Congress specifically excepted the lands they claim from title confirmation pending final disposition of their applications. An analogy is drawn to a withdrawal of land subject to valid existing rights. Contestees contend that section 906's conveyance, like a withdrawal, takes effect as to appropriated land described therein only upon the valid extinguishment of the prior claim. They argue that the Department retains jurisdiction over the subject lands and, accordingly, over the instant dispute by virtue of the fact that the lands have not been conveyed out of Federal ownership.

Reference is also made by contestees to ANCSA conveyances. Contestees point out that section 906(c) provides for legislative confirmation that is subject not only to valid existing rights, but also to Native selection rights under ANCSA. BLM continues to exercise jurisdiction, contestees contend, in adjudicating lands that have been both tentatively approved to the State and selected by a Native corporation. They argue that no reason exists for the Department to retain jurisdiction of tentatively approved lands selected by a Native corporation but lose jurisdiction over tentatively approved lands selected by an Alaska Native.

[1] For the reasons set forth below we agree with the position set forth by contestees and with the order of Judge Clarke and we hold that the Department has jurisdiction to hear the contests at issue.

Judge Clarke in his order of October 21, 1982, has the following discussion of Native allotment applications as constituting "valid existing rights." It is quoted below:

> "Valid existing rights" as used in public land law includes "those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion. The term "valid existing rights" is distinguished from the term "applications" which the Secretary in the exercise of his discretion may reject. (88 I.D. 909 at 911) (M-36910 Supp. (1981)). Vested rights accrue when all statutory requirements have been satisfied. Also see Schraier v. Hickel, 419 F.2d 663, 666 (D.C. Cir. 1969) and Stockley v. United States, 260 U.S. 532, 544 (1923).
>
> In the case of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), that court dealt with the nature of the Alaska Native Allotment applicant that is before this court in the captioned matters as follows:
>
> > The history of the Alaska Native Allotment Act indicates that the Congress did not intend to give unfettered discretion to the Secretary, discretion so broad that there is no law to apply. Cf. Citizens to Preserve Overton Park v. Volpe, 1971, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136. We are persuaded that Congress saw the Act as a means of granting to the Alaska Natives land to which, on compliance with certain conditions, they would become entitled. In 1887, Congress passed the General Allotment Act, 25 U.S.C. § 334, which provided that any

> "Indian" not on a reservation who "settles" land under the statutory requirements "shall be entitled" to an allotment of that land. The language of that statute, as the Secretary admits, gave the Indians an entitlement to the land and did not give complete discretion to the Secretary. However, because a number of lower courts found that Alaska Natives were not within the definition of "Indian," there was doubt whether the General Allotment Act did apply to them. Thus Congress moved in 1906 to eliminate this doubt by passing the Alaska Native Allotment Act.
>
> That Act does provide law that can be applied; it defines the types of land available for allotment and it sets requirements that an applicant must meet in order to qualify. Further, there is no evidence of legislative intent to cut off judicial review. On the contrary, because all indications are that the 1906 Act merely plugged a supposed hole in the coverage of the nondiscretionary 1887 Act the opposite should be inferred.
>
> * * *
>
> This is a clear indication that Congress intended to create or to recognize rights in Alaska Natives to the land that they occupy for the statutory period, and not, as the Secretary contends, merely hope that the government will give them the land. An Alaska Native who meets the statutory requirements on land statutorily permitted to be allotted is entitled to an allotment of that land, and the Secretary may not arbitrarily deny such an applicant.
>
> It appears clear from the foregoing language that the 9th circuit dealt with ANLAA as creating a "valid existing right" as that term is used in public land law. Therefore, I find that the contestees' Alaska Native Allotment application which has been approved by the Bureau of Land Management is a "valid existing right" under section 906(c) of ANILCA and therefore excepted from the grant of the land to the State of Alaska until such time as under due process the application may be set aside.

As there is no objection to his rationale and conclusion and, as there appears no reason to reject them, we hereby adopt the above discussion as our own. We accordingly hold that the Native allotment applications herein constitute "valid existing rights."

We agree with contestees' discussion as to the effect of the provision "subject to valid existing rights." Thus, contestees state:

> In James F. Rapp, 60 Interior Dec. 217, 218 (1948), the Solicitor stated, "[w]here lands subject to an existing homestead entry are

withdrawn under the Reclamation Act, the withdrawal becomes effective as to such land without any further order as soon as the existing entry is cancelled" (emphasis added). Similarly, it was stated in Emma H. Pike, 32 Pub. Lands Dec. 395, 397 (1902), "[i]t is well settled that an executive order creating a reservation for a public purpose, and embracing land created [the decision uses the word "covered"] by a prima facie valid entry, will take effect thereon if the entry is subsequently cancelled". In each of these decisions, the Department specifically acknowledged that the subsequent reservation took effect only upon the extinguishment of the prior claim.

The most explicit statement of this rule of public land law was made in Executive Withdrawal Order of November 26, 1934, as Affecting Taylor Grazing Act and Other Prior Legislation, 55 Interior Dec. 205 (1935), a case cited at length in Arnold v. Morton. In that decision Solicitor Margold stated:

> In my opinion the Executive order applies to lands which, at the date of its issuance, were covered by outstanding entries or other appropriations under the public-land laws or by withdrawals or reservations, and takes effect as to such lands whenever they become a part of the public lands of the United States by reason of the termination of the outstanding appropriation, withdrawal, or reservation.
>
> Unquestionably, the President, acting under the authority granted him in the act of June 25, 1910 (36 Stat. 847), as amended, could withdraw land which is already appropriated, reserved, or withdrawn. Such a withdrawal, however, could take effect as to land already appropriated, reserved, or withdrawn, only upon the valid extinguishment of the prior claim or withdrawal. Compare 5 L. D. 49; 10 L. D. 144; 15 L. D. 2; 32 L. D. 395; 50 L. D. 262. In such a case the Executive withdrawal acts as a claim to the land secondary to that which already exists. As such, it lies dormant until the extinguishment of the prior claim, at which time it can and does actively attach to the land.
>
> * * * * * * * * * * *
>
> Consequently, considering the Executive order as a whole, I hold that while it operates to save valid appropriations, reservations, or withdrawals during the period of their existence, it actually attaches to those lands as a secondary claim and becomes effective upon the termination of the prior claim. [emphasis added]

Id. at 207-08; accord, Williams v. Brening (On Rehearing), 51 Pub. Lands Dec. 225 (1925).

In Stockley v. United States, 260 U.S. 532 (1923), the United States Supreme Court discussed a similar situation. In that case, a settler took possession of land and made a preliminary entry for a homestead. Subsequent to his entry, but prior to submission of final proof, the land was embraced within a large executive withdrawal. The withdrawal order was expressly made "subject to existing valid claims". Id. at 536. The issue arose as to whether the "subject to" phase excepted the settler's entry from the withdrawal. The Supreme Court unhesitatingly found that it had done so.

> The bar of the statute likewise prevails, notwithstanding the executive withdrawal of December 15, 1908. The validity of that order is, of course, settled by the decision in United States v. Midwest Oil Co., 236 U.S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673, but, as already stated, there is excepted from the operation of the order "existing valid claims". Obviously this means something less than a vested right, such as would follow from a completed final entry, since such a right would require no exception to insure its preservation. The purpose of the exception evidently was to save from the operation of the order claims which had been lawfully initiated and which, upon full compliance with the land laws, would ripen into a title. [emphasis added]

Id. at 544.

Similarly, this Board has held that "subject to valid existing rights" excepts the prior claim from a withdrawal. In Stephen Kenyon, 51 IBLA 368 (1980), vacated in part on other grounds, 65 IBLA 44 (1982), Judge Stuebing stated, "[s]ection 3(e) of ANCSA expressly excluded from the lands withdrawn for Native selection any lands which were subject to valid existing rights." Id. at 373 (emphasis in original). In a footnote, the Board noted that the Regional Solicitor, Alaska, advocated a similar position stating, "both patented and unpatented townsite lands are excepted from the ANSCA Sec. 11(a)(1) withdrawals because they are 'valid existing rights.'" Id. at 373 n.7 (emphasis in original).

In each situation where a withdrawal was made "subject to valid existing rights" the withdrawal did not attach to the land until after final disposition of the prior claim. Similarly, in the present situation the confirmation provision of section 906(c) does not attach to the land until the claims of Thorson and Westcoast are terminated. To do otherwise would be contrary to longstanding rules of public land law. [Emphasis in original; footnote omitted.]

We accordingly find that "subject to valid existing rights" means in the instant case that the lands covered in the Native allotment claims are excepted 6/ from the conveyance to the State and that the rights of the State do not attach, if at all, until after the final disposition of the Native allotment claims. If the lands sought in the Native allotment applications are patented to the Natives, then the claim of the State never attaches. For this primary reason, we find that the Board has jurisdiction of the instant private contests against the subject Native allotments. 7/

We further note that exhibits B and C of contestees' brief are decisions of BLM rendered after passage of section 906(c). 8/ There is no suggestion from any of the parties that these decisions are in error. The decisions reveal that even after passage of section 906(c), BLM retained jurisdiction of lands that are both tentatively approved to the State and selected by a Native corporation. In these decisions, BLM rescinded tentative approvals originally issued in the early 1960's and found these same lands proper for village selection. We find no sufficient reason in the record to interpret section 906(c) in a manner that recognizes jurisdiction in BLM to adjudicate the rights of a Native corporation but denies jurisdiction to adjudicate the rights of an Alaskan Native. In so holding, we appreciate the distinct background of the statutes authorizing Native allotment applications and Native corporation selections. We refer specifically to the compromise represented by section 11(a) of ANCSA by which Native corporations were permitted to select lands tentatively approved to, but not yet patented to, the State.

6/ Contrary to the dissent, we find that the words "subject to" are not the equivalent of "including." In fact, ordinarily when land is conveyed "subject to," for example, a life estate or an easement, the grantee receives the land and the life estate or easement remains in the original holder of the life estate or easement. The grantee does not receive the life estate or easement.

7/ Aguilar, supra, which the dissent would follow, involves an entirely different factual situation from the instant Thorson-Westcoast. Thus in Aguilar, patent to the land sought by the Native Allotment applicants had been given to the State of Alaska and under the rules of the Department of the Interior, the land was no longer in Federal ownership and the Department had no jurisdiction to make further disposition of the land. This was the reason the Court and the parties entered into a settlement agreement setting forth the procedures for handling the case, thus providing a special remedy for a special situation. Aguilar v. United States, Civ. No. A 76-271 (D. Alaska Feb. 9, 1983). In the instant Thorson-Westcoast, however, patent to the land sought by the Native allotment applicants has not passed to the State of Alaska and the land is still in Federal ownership and is still in the jurisdiction and control of the Department. There is no reason to resort to the special remedy of Aguilar. Indeed, there are many reasons, detailed in the majority opinion, why the Department has jurisdiction and why it should follow its usual procedures, including a hearing before an Administrative Law Judge.

8/ Exhibit B is State of Alaska, F-028352 (Anch.), State Selection, and AHTNA, Inc., AA-6716-A, Village Selection, issued Nov. 16, 1981. Exhibit C is State of Alaska, F-027969, State Selections; and Mendas Cha -- Ag Native Corp., F-19329-A and F-19329-B, Village Selections, issued Sept. 30, 1982.

Another independent reason for our holding can be found in the legislative history of ANILCA. S. Rep. No. 413, 96th Cong., 1st Sess. 235 (1979), states that Title IX of ANILCA established an expedited legislative conveyance procedure for Native land selections under ANCSA and for State selections under the Alaska Statehood Act. The title was adopted as a means to help resolve Alaska's uncertain land ownership status with respect to State and Native land selections and conveyances. Id. as reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5179.

We fail to see how the interpretation advanced by BLM and the State removes any of the uncertainty in land ownership status found by the Senate Report. If, as BLM and the State maintain, the subject lands are conveyed to the State subject to valid existing rights, what actions could the State take affecting the lands prior to resolution of the Native allotment claims? What procedures would the State use to adjudicate a homestead application filed by a non-Native where the lands sought conflicted with a tentative approval? Would the procedures adopted to implement Aguilar, supra, be applicable to a non-Native? Title IX of ANILCA is captioned "Implementation of the Alaska Native Claims Settlement Act and the Alaska Statehood Act." To interpret section 906(c) in the manner sought by the State and BLM is to add uncertainty to a process that has been marked by delay. Such uncertainty would serve to impede, rather than implement, the legislative design.

Finally, probably the most important reason that the Board has jurisdiction is that the Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending applications, 43 U.S.C. § 1617 (1976)), gave the Department of the Interior the responsibility over granting Native allotments to qualified applicants. No statute has expressly provided that the Department does not have this responsibility. Until Congress expressly provides that the Department is not administering Native allotment rights, then it would be improper both with respect to the public and the Native for the Department to give up this obligation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Clarke's order denying BLM's motion to dismiss is affirmed.

Anne Poindexter Lewis
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

The language of section 906(c)(1) of ANILCA and its legislative history compel the conclusion that Congress intended Alaska to have legal title to all lands tentatively approved to it as of the date of tentative approval. As a result, people in the contestees' position will have to prove the validity of their claims elsewhere than before the Department and, if they do, Alaska will have to reconvey those lands to them.

First, of course, is the language of the statute. Section 906(c)(1) is written in the present tense and explicitly states the active effect of the provision itself. "All tentative approvals * * * are hereby confirmed * * * and the United States hereby confirms that all right, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval * * *." (Emphasis added.) This language makes quite clear that on December 2, 1980, when it enacted ANILCA, Congress granted Alaska all tentatively approved lands effective on the dates of their tentative approval. The provision is thus a confirmation of previous events, a ratification that all title has passed to these lands.

As quoted above, the provision is unambiguous. The only source of ambiguity is the phrase "subject only to valid existing rights," and the question it raises is whether Congress meant to except such lands from the conveyance or make the conveyances subordinate to valid existing rights. In part, the answer to this question may be based on the fact that Congress did not choose the words "except for" but rather "subject to," a phrase that in conveyancing normally is a term of qualification, not one that denotes retention of the property referred to. And, in part, the answer may be based on what Congress said it was doing. Both the Senate and House of Representatives committee reports confirm an intention to convey all the land outright. The Senate report stated the committee had "provided for an immediate, legislative conveyance of a considerable portion of" land Alaska was entitled to (S. Rep. No. 413, 96th Cong., 1st Sess. at 238 (1979)). It explained that by "transferring title" to Alaska the law goes far to alleviating the State's greatest problem, namely "uncertainty concerning the status of its vast lands" (id. at 129). The House committee, too, stated the purpose of the provision was "confirmation and vesting of title of prior tentatively approved (TA'd) lands . . . . Title is deemed to have vested with the State as of the date of TA" (H.R. Rep. No. 97, part I, 96th Cong., 1st Sess. at 298 (1979)). The provision was enacted even though dissenting members of both House and Senate made clear their view that it was unnecessary (id. at 563, 564; S. Rep. No. 413, supra at 429-430). It is apparent that the Congress considered it was necessary to resolve the uncertain status of these lands by vesting legal title in the State of Alaska.

I recognize that native allotment applicants whose applications were approved will have to go through what they characterize as the "more cumbersome" procedures resulting from Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), in order to vindicate the validity of their rights. But, in my view, this consequence cannot be avoided in light of what the Congress has done. By vesting title to such lands in the State, subject to

its reconveyance, Congress simply transferred the temporary uncertainty from the State to the applicants. In effect, however, this only gives the applicants an incentive to do what they should have to do anyway, namely, prove they are entitled to the land. It does not seem to me unfair to ask that they meet this burden. In the meantime, I trust the State of Alaska will treat them fairly.

Finally, I cannot agree that there was "no need for oral argument" in this case (see note 1 of the majority opinion). The briefs may or may not have been "comprehensive," but, in my view, the importance of the issues in this case -- and of the effects of our decision -- warranted the kind of full exploration that can be had only from direct questioning of counsel. I recognize it is neither possible nor necessary to have oral argument in every case from Alaska. I think it is time for parties regularly involved with the Board to develop and propose suggestions for whether, when and where oral argument should be held so that a prudent basis is established for doing so. Such an approach should help assure the "rightness" of our decisions and the quality of their reasoning.

_____
Will A. Irwin
Administrative Judge